Supreme Court of the United States

OCTOBER TERM, 1948.

No. 271

In the Matter of the Criminal Contempt Charge

—against—

ROBERT CARUBA.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CHANCERY OF NEW JERSEY.

THOMAS J. BROGAN,
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JOSEPH WEINTRAUB,
PHILIP B. KURLAND,
For the Petitioner.

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner respectfully shows:

JURISDICTION.

The order of the Chancellor of New Jersey was entered on July 6, 1947. Jurisdiction of this Court is invoked under Title 28, Section 1257(3) of the United States Code.*

*In the event that this petition for certiorari is granted, the writ should be directed to the Superior Court of New Jersey. It is that court to which, under the New Jersey Constitution of 1947, pending cases are transferred from the Court of Chancery when the Judiciary Article of that Constitution takes effect on September 15, 1948. Art. XI, Sec. IV, para. 8(e); Art. XI, Sec. IV, para. 14. A cause is deemed "pending" if "the time limited for review has not expired." Art. XI, Sec. IV, para. 8.

An appeal has been taken from the order of the Chancellor, from which this petition is sought, to the New Jersey Court of Errors and Appeals. At this time, it is not clear whether the Court of Errors and Appeals has jurisdiction to entertain that appeal. If that appeal is dismissed, the order of the Chancellor will be the final decree for purpose of certiorari. If the Court of Errors and Appeals determines that the appeal lies, petitioner respectfully requests that this petition for certiorari be dismissed for want of a final decree.

The Court of Errors and Appeals is not expected to act upon the appeal from the Chancellor until after the time to petition for certiorari from the decree of the Chancellor has expired. It is for this reason that the petition has been filed at this time. Petitioner, however, respectfully requests that this Court withhold action upon this petition until the Court of Errors and Appeals discloses whether the decree of the Chancellor is final under the laws of New Jersey.

OPINIONS BELOW.

The opinion of the Vice Chancellor (R. 42-74) is reported in 139 N. J. Eq. 404. The opinion of the Court of Errors and Appeals (R. 2/82) is reported in 140 N. J. Eq. 563. The opinion of the Chancellor (R. 22//) is not yet reported.

STATUTES INVOLVED.

The pertinent New Jersey statutory provisions are set forth in the appendix *infra*.

QUESTIONS PRESENTED.

1. Whether it is a denial of due process of law or equal protection of the laws in violation of the Fourteenth Amendment for an appellate court to make a finding of obstruction to the administration of justice in a case of criminal con-

tempt where there has been no prior charge or determination of obstruction in the trial court.

2. Whether it is a denial of due process of law or equal protection of the laws in violation of the Fourteenth Amendment for the courts of New Jersey to deprive a person found guilty of criminal contempt of the judicial review to which he and others in his situation are entitled under the New Jersey statutes and under the recognized judicial construction of those statutes.

3. Whether it is a denial of due process of law or equal protection of the laws in violation of the Fourteenth Amendment to try and to adjudge as criminal contempt acts of perjury or false swearing which are, in fact, not obstructive to the administration of justice.

STATEMENT.

A somewhat lengthy statement of facts is required: first, because of the complicated proceedings in the New Jersey courts; second, because petitioner contends that he has been deprived of due process of law and equal protection of the laws in violation of the Fourteenth Amendment by the very course of these proceedings; and finally, because the issue whether the federal questions have been timely raised depends, in part, on the unusual and surprising judicial action which this case presents.

The petitioner, Robert Caruba, is one of several defendants in a civil action pending in the New Jersey Court of Chancery since September, 1945. The contempt charge which frames the issue in this case arose in one of the phases of that litigation in the following manner:

Early in the presentation of complainant's case, complainant obtained an order for discovery. A master was designated to supervise the inspection of the books and records at the expense of the complainant (R. 897-901). The master's

function was solely to "supervise" the inspection and examination and "to report to this Court any situation or difficulty arising with respect to the observance of the directions of this order or with respect to any situation arising not covered by the provisions hereof" (R. 229, 233). The master was not empowered to make any findings of fact. The evidence taken by him merely became part of the record in the civil litigation.

While the petitioner, an accountant, was testifying before the master with reference to the books and records, the two instances of "perjury" which led to the contempt charge occurred.

During his examination before the master, on April 2, 1946, Caruba was shown a check dated March 8, 1943 in the sum of $250.00 drawn on the checking account of the Imperial Fur Blending Corporation, a defendant, by Robert Caruba as its Treasurer to his individual order. This check had been mutilated: the endorsements had been cut off. Caruba testified that this check represented monies advanced to Philip A. Singer, another defendant, for certain expenses Singer had incurred on a trip to Montreal, and that he, Caruba, had cashed the check and given the proceeds to the defendant Villani who apparently was to turn them over to Singer. This testimony was concededly truthful. The alleged perjury was with respect to the following:

Caruba testified that he didn't know that the endorsements had been snipped off. On April 5, 1946, while Caruba was still being examined by the complainant, he denied that he knew who had sheared off the endorsements but that from an examination of the bank endorsements on the back of the check he believed that the check bore his own endorsement and that of a Mr. Ball, who cashed the check as an accommodation. He also testified that the portion of the check which was "snipped" off disclosed the Montreal trip of Mr. Singer. He then testified further that he himself had mutilated the check prior to the trial of the case. Subsequently, a photostatic copy of the check was obtained from the bank at which

it had been cashed and offered as an exhibit. The front of the check contained the notation "Traveling Expenses—Montreal" and the check bore, as Caruba had testified, endorsements by Caruba and Ball (R. 7-14).

The second "perjurious" incident, on which the contempt charge rests, concerned testimony about a check in the sum of $800.00, dated June 22, 1945, and payable to M. Reiner & Bro., Inc. This check was charged on the books of the Imperial Fur Blending Corporation as a loan to Caruba. On May 2, 1946, Caruba testified that this check was for the purchase of a fur coat which had been bought for the firm. He then proceeded to testify that the coat had been purchased for "experimental purposes, copying" but, after further examination, testified as follows:

> "Q. If the transaction involving the $800 expense was as you narrate it here, why did you hesitate when first asked about it, to state the reason, and stated you preferred not to? A. Because I just didn't want to say it, that is all.
>
> Q. No reason? A. No particular reason for it.
>
> Q. Just caprice? A. Call it what you wish.
>
> Q. I am asking you for the reason. Was it caprice? A. No, I just didn't want to give out the information where we used that $800.
>
> Q. What injury to your company did you fear from narrating this transaction which I have finally gotten from you? A. None.
>
> Q. What injury did you fear to yourself? A. I gave a gift there, I didn't want you to misunderstand it.
>
> Q. To whom? A. It is a matter of giving a gift to Singer, Philip Singer, in 1945.
>
> Q. Then you do know for whom the coat was made, for Philip Singer? A. As a gift, yes.
>
> Q. Why didn't you tell that at first? A. I just didn't say it, that is all.
>
> Q. Why did you tell us the story that this coat was

bought for experimental or copying purposes when in fact, and to your knowledge, it was your gift to Philip Singer? A. That is the way I thought it out. I just didn't want to give the information, that is all.

Q. It was a gift to Philip Singer, it wasn't for his personal wear, was it? He doesn't wear a mink coat? A. No.

Q. For whom was the coat intended. A. For Mrs. Singer.

Q. You knew it, didn't you? A. Yes.

Q. Did Singer ever give you back the $800? A. No, sir.

Q. Purely a gift? A. Purely a gift.

Q. That is how we get $800 out of your $2,500 bonus? A. That is true.

Mr. Ruback: I offer in evidence the $800 check dated June 22, 1945, respecting which the witness has just been interrogated, check made by the Imperial, signed by Caruba to the order of M. Reiner & Bro.

(Check, above referred to, received in evidence, and marked Exhibit CM-63.)

Q. Mr. Caruba, what is the reason you made a $800 gift to Mr. Singer's wife? A. He was very helpful to us during 1945.

Q. He was then employed as the business manager of the Imperial? A. Sales manager in New York.

Q. In charge of the New York office? A. That is right.

Q. For which he got $200 a week? A. Correct.

Q. Which $200 was cleared through your name? A. That is true.

Q. Notwithstanding the fact he was getting $200 a week for his services, you felt that you personally should make him a gift of $800? A. That is true." (R. 15-31)

The last of the testimony described above was given on May 2, 1946. The discovery proceedings and the proceedings in the main case were in no way delayed by the "perjurious" testimony.

On September 14, 1946 the complainant presented a petition, formally made out to the Chancellor but, in fact, presented to the Vice Chancellor[1] who had appointed the master, asking that Robert Caruba be adjudged guilty of criminal contempt. Although the master had never indicated that Caruba's testimony had been contemptuous or obstructive, the Vice Chancellor immediately issued an Order to Show Cause why the petitioner should not be punished for contempt, returnable September 19, 1946. On September 19, 1946 the hearing on the Order to Show Cause was continued until October 9, 1946 and also on the same day Meyer E. Ruback, solicitor for the complainant in the litigation, was appointed solicitor to prosecute the contempt proceeding for the court.

At the hearing the petitioner pleaded "not guilty".[2] The prosecutor for the court introduced in evidence the petition asking that criminal contempt proceedings be instituted (the parties had stipulated that the petition correctly set forth Caruba's testimony); the checks with reference to which Caruba testified; and, on the issue of materiality only, all of the testimony in the main case, then transcribed, which included the complainant's direct case and a part of the direct testimony of the first witness for the defense (R. 92-95). He then rested (R. 96). No evidence was introduced on behalf of the petitioner, but various arguments were made in support of a motion to dismiss

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[1] In New Jersey acts of a Vice-Chancellor are in form merely recommendations to the Chancellor in whose name all orders are issued. See, *e.g.*, In re New Jersey State Bar Association, 112 N. J. Eq. 606, 617 (1933). Nevertheless, an appeal may lie from the Vice Chancellor to the Chancellor. Such an appeal, as the statement of facts discloses p. 11 *infra*, was taken at a later stage of this case under the provisions of N. J. R. S. 2:15-12.

[2] At the time of the trial of the contempt charge, the final hearing in the civil proceeding was still in progress. As of the present writing, the Vice Chancellor has not yet decided the issues in the civil proceeding.

the petition (R. 96-106). On January 29, 1947 the Vice Chancellor filed an opinion finding Caruba guilty of criminal contempt.[3] This opinion stated that the perjury was contumacious if it "tended" or "attempted" to obstruct justice.[4] No finding of actual obstruction was made. Indeed, the Vice Chancellor in his opinion affirmatively indicated that actual obstruction was not necessary.[5] The Vice Chancellor also determined that although the testimony had been taken before a master, the contempt was nevertheless *in facie curiae*. Other contentions of the petitioner were overruled. On February 20, 1947 proceedings were held looking toward imposition of sentence. The prosecutor for the court recommended a minimum confinement of six months (R. 131-132). The Court sentenced Caruba to sixty days in jail (R. 134).

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[3] This finding rested solely upon the two instances of false testimony. The mutilation of the check was neither charged nor found to be contumacious.

[4] The petition charged as to one instance of alleged perjury that "Said testimony was given corruptly and *for the purpose of* obstructing and subverting the justice of the cause." (R. 32) (Emphasis added.) As to the other incident, the petition charged that "the testimony was given by said witness *for the purpose* and *with the design of* misleading your Honor in the determination of the disputed facts in the case." (R. 15) (Emphasis added.) Immediately following this sentence, it was alleged that the conduct of Caruba was "obstructive." In context, the word "obstructive" clearly meant only an attempt to obstruct. Moreover, no facts were at any time presented to the Vice Chancellor to prove that the testimony, or any part of it, did have an obstructive effect.

[5] "The federal cases cited in support of the argument that where there is no obstruction of justice there is no contempt are not controlling. They all arose out of contempt proceedings in inferior Federal courts, the creatures of statute, having no common law jurisdiction in matters of contempt, and the decisions were controlled by statute. They need not be further considered here. None of the New Jersey cases cited is authority for the proposition advanced, They hold uniformly that any act or conduct which obstructs or *tends to obstruct* the course of justice constitutes a contempt of court."

* * * * *

"New Jersey cases holding that acts or conduct which *tend* to obstruct the course of justice, or which are merely *attempts* to obstruct, not actual obstruction of justice, constitute contempt of court are: In re Bowers, 89 N. J. Eq. 307; Ivens v. Empire Floor & Wall Tile Co., supra; In re Hand, 89 N. J. Eq. 469; In re Merrill, 88 N. J. Eq. 261; Sachs v. High Clothing Co., supra; In re Jenkinson, 93 N. J. Eq. 545; In re Megill, 114 N. J. Eq. 604; In re Hendricks, 113 N. J. Eq. 93; Backer v. A. B. & B. Realty Co., supra; In re Singer, supra; Edwards v. Edwards, 87 N. J. Eq. 546; Seastream v. N. J. Exhibition Co., supra. See also In re Charlton, 2 My & Cr. 317, 40 Eng. Rep. 661; People v. Freeman, supra. In the Charlton case Chancellor Cottenham, at page 671, said: 'All these authorities tend to the same point;

From the order holding petitioner in contempt of court, an appeal was taken to the New Jersey Court of Errors and Appeals under the following provisions of New Jersey law:

> "Whenever any person or corporation is adjudged in contempt by the court of chancery, *for acts done or omitted elsewhere than in the presence of the court,* and that court shall, in consequence, impose upon such person or corporation a fine, imprisonment or other punishment, such person or corporation may appeal from such adjudication to the court of errors and appeals, which appeal shall be taken and prosecuted in all respects as other appeals are taken and prosecuted from the court of chancery." N. J. R. S. 2:15-13. (Emphasis added.)

Inasmuch as the Vice Chancellor had jurisdiction only if the contempt was committed in the "actual presence of the court",[6] it was clear under the foregoing New Jersey statutes and under the applicable New Jersey decisions that the appellate body to determine this matter of jurisdiction was the Court of Errors and Appeals. If that Court decided that the contempt had been committed in the "actual presence of the Court," it should dismiss the appeal and the petitioner, under the provisions of N. J. R. S. 2:15-12, would

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they show that it is immaterial what measures are adopted, *if the object is to taint the source of justice,* and to obtain a result of legal proceedings different from that which would follow in the ordinary course, it is a contempt of the highest order.' In finding the defendant guilty of contempt in that case the Chancellor said his main offense was 'his having *attempted,* by writing the letter, *to influence* the conduct of the Master.' The first defense can not prevail."

[6] The power of the New Jersey courts to punish for contempt is limited by statute [similar to that controlling in the federal courts (18 U. S. C. §401)] to three cases: (1) "misbehavior of any person in the actual presence of the court"; (2) "misbehavior of an officer of the court in his official transactions"; and (3) disobedience to any lawful writ, process, order, rule, decree or command. N. J. R. S. 2:15-1. Concededly, if Caruba did not come within the first category, he was not guilty of contempt unless, of course, as the Vice Chancellor suggested in his opinion (R. 71-72) the statute was unconstitutional. If, therefore, the Court of Errors and Appeals had determined that the statute was constitutional and the contempt was not *in facie curiae,* it would have reversed the conviction.

then appeal from the decision of the Vice Chancellor to the Chancellor for a determination upon the merits. This section provides,

> "A vice chancellor, when sitting as a judge of the court of chancery for the transaction of the business of that court, may adjudicate upon and punish any and all contempts committed by any person in the presence of the court so held by the vice chancellor, in the same manner as the chancellor may do. Any person adjudicated guilty of contempt under this section shall have the right of immediate appeal to the chancellor which appeal shall operate as a stay of proceedings. The chancellor shall provide by rule for the manner and method of appeal, which he shall hear on its merits.
>
> "The several sheriffs and keepers of the common jails of the several counties of this state shall respect and execute all orders and commitments made and signed by a vice chancellor in any matter of contempt in all respects as if made and signed by the chancellor."

Following the indicated procedure, Caruba appealed to the New Jersey Court of Errors and Appeals. Since under the foregoing statutes that Court was limited in its jurisdiction to a determination whether the contempt had been committed within the "actual presence" of the court, Caruba was under no obligation to present any questions other than that of the jurisdiction of the Vice Chancellor for its consideration.[7]

The Court of Errors and Appeals by all rules and standards of New Jersey law should have dismissed the appeal,

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[7] Caruba did present questions on the merits to the Court of Errors and Appeals, however, because of the Vice-Chancellor's suggestion that the statutes of New Jersey limiting the powers of courts over contempts were unconstitutional. See note 6 *supra*.

it having found that the contempt was committed "in the actual presence" of the Court of Chancery. Its *per curiam* opinion, from which six of the thirteen members dissented, nevertheless dealt with the merits, although its order paradoxically provided for dismissal of the appeal as well as for affirmance.[8]

Surprised by the fact that the Court of Errors and Appeals had departed from the indicated limitations on its authority, Caruba filed a petition for rehearing prior to the issuance of the remittitur, presenting to that Court the constitutional issues upon which this petition is based. The petition was denied, as was a second such peition (R. 220 4).

Following the denial of the petitions for rehearing, Caruba appealed to the Chancellor under N. J. R. S. 2:15-12, it having been decided by the Court of Errors and Appeals that the contempt was committed in the "actual presence" of the Vice Chancellor. Appellant, following the plain mandate of this statute, believed that a full hearing on the merits could be secured only before the Chancellor. Moreover, had he not sought relief from the Chancellor, he would not have exhausted his state remedies and obtained a "complete" as well as a "final" judgment required for purposes of certiorari to the United States Supreme Court.[9]

Before the Chancellor, Caruba contended that it was for the Chancellor to determine all questions on the merits, and that the statements in the *per curiam* opinion of the Court of Errors and Appeals, in view of the statutory restrictions

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[8] "The order of the Court of Chancery made on the 20th day of February, 1947 from which the appellant appealed be and the same is hereby in all things affirmed with costs in this court to be paid by said appellant and that the petition of appeal in the same is hereby dismissed." (R. 218)

Prior to the enactment of N. J. R. S. 2:15-13, the Court of Errors and Appeals did not have jurisdiction to review contempt orders of the Court of Chancery, Seastream v. New Jersey Exhibition Co., 72 N. J. Eq. 377 (1907); Grand Lodge Knights of Pythias v. Jansen, 62 N. J. Eq. 737 (1901).

[9] See Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (1936) §30; Prudential Insurance Co. v. Cheek, 252 U. S. 567 (1920), discussed in Prudential Insurance Co. v. Cheek, 259 U. S. 530, 533-534 (1922); dissenting opinion of Mr. Justice Rutledge in Parker v. Illinois, 333 U. S. 571, 583-584 (1948); Republic Natural Gas Co. v. Oklahoma, No. 134, O. T. 1947.

on that court's jurisdiction and its order dismissing the appeal were *obiter dicta*. He pointed out, in effect, that if the Chancellor refused to consider the merits of his case merely because of the statements in the opinion of the Court of Errors and Appeals, the following trap would have been sprung: Had Caruba initially appealed to the Chancellor under N. J. R. S. 2:15-12 rather than to the Court of Errors and Appeals, he would have conceded one of his principal arguments, that the contempt had not been committed in the actual presence of the Court. Yet the preliminary appeal to the Court of Errors and Appeals, which avoided this concession, deprived him of the hearing on the merits before the Chancellor to which, under N. J. R. S. 2:15-12, he was entitled if, as the Court of Errors and Appeals had determined, the misbehavior had been *in facie curiae*.

The Chancellor, although admitting that "a persuasive argument based on the statutory provisions could be made as to the authority of the Chancellor to presently entertain the defendant's statutory petition of appeal", nevertheless considered that it would be "presumptuous" of the Chancellor to deal with the merits when the Court of Errors and Appeals had already done so. He, therefore, limited the argument to the question whether the Chancellor could modify the sentence and held that he lacked the power to do so inasmuch as the sentence "had been approved by a court of last resort".

On July 6, 1948 the Chancellor entered an order dismissing the petition of appeal from the Vice Chancellor (R.22a5). The petition for certiorari is taken from that order.

One more possibility of appeal within the complicated New Jersey judicial system may exist. The Court of Errors and Appeals [10] may determine that it has jurisdiction to hear an

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[10] On September 15, 1948 the judiciary article, Art. VI, of the New Jersey Constitution becomes effective. Art. XI, Sec. IV, Par. 14. The New Jersey Supreme Court, which under the constitution becomes the court of last resort in New Jersey, may be the authority to pass upon the appeal. Art. VI, Sec. I; Art. XI, Sec. IV, Para. 8(a).

appeal from the Chancellor.[11] The petitioner, therefore, at the same time that he is presenting this petition for certiorari to the Supreme Court of the United States is appealing from the order of the Chancellor to the Court of Errors and Appeals. If this appeal is dismissed, the order of the Chancellor will be the final and complete decree for purpose of certiorari.[12] If, on the other hand, the Court of Errors and Appeals accepts jurisdiction of the appeal from the decision of the Chancellor, the petitioner requests that this petition for certiorari be dismissed, since the judgment of the Chancellor will not be a final decree.

Petitioner, therefore, respectfully repeats his request that this Court withhold action upon the petition for certiorari until action by the Court of Errors and Appeals discloses whether or not the decree of the Chancellor is final. Compare, as to the propriety of such a procedure, *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 163, n. 3 (1932).

THE FEDERAL QUESTIONS.

Petitioner presents three federal questions for the consideration of this Court. Each arises out of a different aspect of the contempt litigation, and the timeliness of the raising of each depends upon somewhat different considerations.

Question 1: Whether it is a denial of due process of law or equal protection of the laws in violation of the Fourteenth Amendment for an appellate court to make a finding of obstruction to the administration of justice in a case of criminal contempt where there has been no prior charge or determination of obstruction in the trial court.

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[11] Compare N. J. R. S. 2:29-117 with N. J. R. S. 2:15-12 and N. J. R. S. 2:15-13. To the knowledge of the petitioner, no appeal to the Court of Errors and Appeals has ever been attempted where, under N. J. R. S. 2:15-12, the Chancellor has refused to review a contempt order of the Vice Chancellor.

[12] If petitioner waited to file his petition for certiorari until after dismissal of the appeal, if such dismissal there be, by the Court of Errors and Appeals, the statutory period for filing a petition for certiorari might have elapsed. See Randall v. Board of Commissioners, 261 U. S. 252 (1923) and authorities cited.

The decision of the New Jersey Court of Errors and Appeals brought this question into existence for the first time, since it is that decision of which constitutional complaint is made. It was, therefore, timely for the petitioner to present this federal question in an explicit form at his earliest possible opportunity, that is, upon petition for rehearing. The perfunctory denial of this petition does not, under these circumstances, deprive petitioner of the right to invoke the question here. *Cole* v. *Arkansas,* 333 U. S. 196, 200 (1948); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673, 678 (1930); *Saunders* v. *Shaw,* 244 U. S. 317, 320 (1917); *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District,* 281 U. S. 74, 79 (1930); *Missouri ex rel. Missouri Insurance Co.* v. *Gehner,* 281 U. S. 313, 320 (1930); *Great Northern Ry* v. *Sunburst Oil & Refining Co.,* 287 U. S. 359, 367 (1932); Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (1936) 120-125. Nor is petitioner deprived of his right to invoke this question by his failure to present it to the Chancellor. The appeal to the Chancellor was not from the decision of the Court of Errors and Appeals but from the decision of the Vice Chancellor. N. J. R. S. 2:15-12. The Chancellor was without authority to determine that the Court of Errors had acted unconstitutionally, since under New Jersey Law he is an inferior tribunal. N. J. Const. Art. VI, Sec. 1; N. J. R. S. 2:29-117. But the petitioner had to seek a decision by the Chancellor prior to petitioning this Court for certiorari in order to exhaust his state remedies. See the discussion in *Republic Natural Gas Co.* v. *Oklahoma,* No. 134, O. T. 1947 and other authorities cited at note 9 of this petition.

Question 2: Whether it is a denial of due process of law or equal protection of the laws in violation of the Fourteenth Amendment for the courts of New Jersey to deprive a person found guilty of criminal contempt of the judicial review to which he and others in his situation are entitled under the New Jersey statutes and under the recognized judicial construction of those statutes.

This question, like the first, arises out of judicial action taken after the decision of the Vice Chancellor. For this reason, it was timely for petitioner, as in the case of the first question, to raise it at his earliest opportunity. Insofar as the existence of the question depends upon the action of the Court of Errors and Appeals, it was timely raised in the first petition for rehearing. Insofar as its existence depends upon the action of the Chancellor, the first opportunity petitioner has had is upon this petition for certiorari.[13]

Question 3: Whether it is a denial of due process of law or equal protection of the laws in violation of the Fourteenth Amendment to try and to adjudge as criminal contempt acts of perjury or false swearing which are, in fact, not obstructive to the administration of justice.

Petitioner admits that according to the usual rule this question should have been presented to the trial court and thereafter saved. If, however, state practice permits the federal question to be raised in the appellate court for the first time, this Court will take cognizance of the state procedure. *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 651 (1942); *Reeves v. Williamson,* 317 U. S. 593 (1942). Petitioner does not contend that the state practice necessarily permits a federal question to be raised for the first time on appeal.[14] But, at the least, New Jersey follows the practice of most states in permitting appellate courts in their own discretion to consider contentions first raised on appeal. *McMichael* v. *Horay,* 90 N. J. L. 142, 145 (1917); *Punk* v. *Botany Worsted Mills,* 105 N. J. L. 647, 649 (1929). If this discretion is exercised, then, of course, the federal question

[13] It was useless to ask the Chancellor for rehearing, since he made his decision not to determine the merits known prior to the filing of his opinion.

[14] It may be noted, however, that under N. J. R. S. 2:15-12 the Chancellor is reviewing his own decision (R. 75-77). It might be argued, therefore, that since he must determine the matter "on its merits" under the foregoing statute, he must determine all questions, whether raised or not before the Vice Chancellor. Petitioner, although he does not concede this point, does not know of any New Jersey decisions which have passed upon the question.

is timely raised. Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (1936) 130 and authorities cited at n. 1 thereof.

In the instant case petitioner was deprived of the opportunity of invoking the discretion of the Chancellor to determine federal questions not raised at the trial, since the Chancellor—unconstitutionally, he believes—refused to hear the merits. For this reason it was impossible for petitioner, once he had not presented his federal question to the trial court, to have the opportunity afforded by New Jersey law to all litigants to invoke the appellate discretion. This foreclosure, if it does not itself present a federal question here cognizable, should not deprive him of the right to be heard in this Court.

Petitioner, in the unique circumstances which this litigation presents, accordingly submits that all the federal questions were properly and timely raised.

REASONS FOR GRANTING THE WRIT.

Each of the questions here presented raises important issues as to the construction and application of the due process and equal protection clauses of the Fourteenth Amendment in the administration of justice in the state courts.

1. The petitioner was found guilty of perjury or false swearing which "tended" or "attempted" to obstruct the administration of justice. He appealed to the Court of Errors and Appeals on the ground that without the existence of actual obstruction the Vice Chancellor lacked jurisdiction to hold him in contempt. The Court of Errors and Appeals, apparently in agreement with petitioner's jurisdictional argument, made a finding that there was actual obstruction. In so finding, it deprived petitioner of the elementary right to have notice of and opportunity to defend a criminal charge. In the trial court petitioner was obliged to meet

only the question of intent. As the prosecutor said, "It is not the effect of this false swearing that tests the conduct of the accused, it is the purpose of the false swearing." (R. 107). Yet the appellate court, by its decision, made an issue of the "effect". "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole* v. *Arkansas,* 333 U. S. 196, 201 (1948); *In re Oliver,* 333 U. S. 257, 273 (1948). Petitioner was not charged with actual obstruction,[15] nor was he found guilty by the Vice Chancellor of actual obstruction. The appellate court in violation of the rule established in *Cole* v. *Arkansas,* 333 U. S. 196 (1948) substituted its own findings of fact in a criminal trial [16] for those made in the trial court. Petitioner, as in the *Cole* case, was entitled to have the validity of his conviction "appraised on consideration of the case as it was tried and as the issues were determined in the trial court." *Id.* at 201.

2. The action of the New Jersey Court of Errors and Appeals, when taken in conjunction with the subsequent action of the Chancellor, deprived petitioner of the hearing on the merits to which he was entitled under the plain and unequivocal meaning of the New Jersey statutes. N. J. R. S. 2:15-12. Petitioner appealed from the holding of criminal contempt to the Court of Errors and Appeals in the belief, clearly justified by the New Jersey statutes (N. J. R. S. 2:15-1, 2:15-12, 2:15-13), that that Court was authorized to determine only whether the contempt had been committed in the "actual presence" of the court. Nevertheless, the Court in its opinion dealt with some of the merits of petitioner's case; and the Chancellor, who ordinarily would have determined the merits, thereafter refused to do so.

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[15] See note 4 *supra.*

[16] In New Jersey a charge of criminal contempt is considered a criminal charge. See *Patco Products* v. *Wilson,* 140 N. J. Eq. 91, 93 (1947).

Petitioner acknowledges that ordinarily there is no constitutional right to an appeal. But due process of law and equal protection of the laws demand that where the legislature has provided for an appeal, elementary notions of fairness and civilized justice must prevail, and all litigants are entitled to the same appellate opportunities. *Cole* v. *Arkansas*, 333 U. S. 196, 201 (1948); *Frank* v. *Mangum*, 237 U. S. 309, 327 (1915); *Cochran* v. *Kansas*, 316 U. S. 255 (1942); *Boykin* v. *Huff*, 121 F. 2d 865, 872 (App. D. C. 1941) (per Rutledge, J.). Due process of law and equal protection of the laws under the Fourteenth Amendment may be violated and were in this case violated by the courts of a state. See *Shelley* v. *Kraemer*, Nos. 72, 87, O. T. 1947; *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U. S. 673 (1930).

3. It is the position of the petitioner that perjury or false swearing,[17] unless obstructive to the administration of justice, may not be tried by contempt but must be tried in accordance with the criminal procedure which the state provides. Although petitioner knows of no direct holding to that effect by the United States Supreme Court in a case arising in a state court, the language of *Ex parte Hudgings*, 249 U. S. 378, 383 (1919) seems clearly restrictive of all courts, state and federal.[18] Moreover, recent decisions such as *In re Oliver*, 333 U. S. 257 (1948); *Craig* v. *Harney*, 331 U. S. 367 (1947); *Pennekamp* v. *Florida*, 328 U. S. 331 (1946); *Bridges* v. *California*, 314 U. S. 252 (1940) indi-

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[17] New Jersey has both a perjury and a false swearing statute. N. J. R. S. 2:157-1; N. J. R. S. 2:157-4. Under the former, the falsity of the testimony must be proved by two witnesses or by one witness and corroborating evidence. State v. Lupton, 102 N. J. L. 530 (1926); State v. Ellison, 114 N. J. L. 237 (1935); State v. Ewen, 6 N. J. M. 151 (1928). Under the latter contradictory statements under oath constitute prima facie evidence that one or the other is false. N. J. R. S. 2:157-5.

[18] That Ex parte Hudgings, 249 U. S. 378 (1919) states a rule of due process rather than merely a judicial limitation upon the powers of the federal courts is indicated by the fact that Congress also may not punish for contempt non-obstructive acts. Brandeis, J. in Jurney v. MacCracken, 294 U. S. 125, 147-148 (1935); Marshall v. Gordon, 243 U. S. 521 (1917).

cate that the rule that the contempt power is "the least possible power adequate to the end proposed," *Anderson* v. *Dunn*, 6 Wheat. 204, 231 (1820), quoted by the Court in *In re Oliver*, *supra*, applies to the state as well as to the federal courts.[19] For contempt proceedings to be substituted for the usual criminal procedure, as Mr. Justice Frankfurter stated in his concurring opinion in the *Oliver* case, 333 U. S. at 284, "There must * * * be such recalcitrance, where the basis of punishment is testimony given or withheld, that the administration of justice is actively blocked. See *Ex parte Hudgings*, 247 U. S. 378."

If petitioner is correct in his argument that actual obstruction of the administration of justice is a constitutionally necessary prerequisite to criminal contempt for perjury or false swearing, it is for this Court to determine for itself whether the record discloses such obstruction, assuming the charge was properly made. *Oyama* v. *California*, 332 U. S. 633, 636 (1948) and cases cited therein at n. 4; *Pennekamp* v. *Florida*, 328 U. S. at 345-346. A reading of the record will disclose to the Court that the perjury or false swearing which gave rise to this proceeding was no more obstructive than the perjury in *In re Michael*, 326 U. S. 224 (1945). Here, as in the *Michael* case, "there was, at best, no element except perjury 'clearly shown.'"

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this case is one calling for the exercise by this Court of its jurisdiction by writ of certiorari.

Respectfully submitted,

THOMAS J. BROGAN,
JACOB L. NEWMAN,
JOSEPH WEINTRAUB,
PHILIP B. KURLAND.

September, 1948.

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[19] This Court recently granted certiorari in a case involving the power of a state court to adjudge acts in criminal contempt. *Fisher* v. *Pace*, No. 756, O. T. 1947.

APPENDIX.

New Jersey Constitution of 1844.

Article VI, Section 1, Paragraph 1.

The judicial power shall be vested in a court of errors and appeals in the last resort in all causes, as heretofore; a court for the trial of impeachments; a court of chancery; a prerogative court; a supreme court; circuit courts, and such inferior courts as now exist, and as may be hereafter ordained and established by law; which inferior courts the legislature may alter or abolish, as the public good shall require.

New Jersey Constitution of 1947.

Article VI, Section 1.

1. The judicial power shall be vested in a Supreme Court, a Superior Court, County Courts and inferior courts of limited jurisdiction. The inferior courts and their jurisdiction may from time to time be established, altered or abolished by law.

Article XI, Section 4.

8. When the Judicial Article of this Constitution takes effect:

(a) All causes and proceedings of whatever character pending in the Court of Errors and Appeals shall be transferred to the new Supreme Court * * *.

(e) All causes and proceedings of whatever character pending in all other courts which are abolished shall be transferred to the Superior Court.

For the purposes of this paragraph * * *, a cause shall be deemed pending notwithstanding that an adjudication has been entered therein, provided the time limited for review has not expired * * *.

14. The Judicial Article of this Constitution shall take effect on the fifteenth day of September, one thousand nine hundred and forty-eight.

New Jersey Revised Statutes.

2:15-1

The power of any court of this state to punish for contempt shall not be construed to extend to any case except that:

a. Misbehavior of any person in the actual presence of the court;

b. Misbehavior of any officer of the court in his official transactions; and

c. Disobedience or resistance by any court officer or by any party, juror, witness or other person to any lawful writ, process, order, rule, decree or command of the court.

2:15-12

A vice chancellor, when sitting as a judge of the court of chancery for the transaction of the business of that court, may adjudicate upon and punish any and all contempts committed by any person in the presence of the court so held by the vice chancellor, in the same manner as the court may do. Any person adjudicated guilty of contempt under this section shall have the right of immediate appeal to the chancellor, which appeal shall operate as a stay of proceedings. The chancellor shall provided by rule for the manner and method of appeal, which he shall hear on its merits.

The several sheriffs and keepers of the common jails of the several counties of this state shall respect and execute all orders and commitments made and signed by a vice chancellor in any matters of contempt in all respects as if made and signed by the chancellor.

2:15-13

Whenever any person or corporation is adjudged in contempt by the court of chancery, for acts done or omitted elsewhere than in the presence of the court, and that court shall, in consequence, impose upon such person or corporation a fine, imprisonment or other punishment, such person or corporation may appeal from such adjudication to the court of errors and appeals, which appeal shall be taken and prosecuted in all respects as other appeals are taken and prosecuted from the court of chancery.

2:29-117

All persons aggrieved by any order or decree of the court of chancery may appeal therefrom, or any part thereof, to the court of errors and appeals.

2:157-1

Any person who shall willfully and corruptly commit perjury or shall by any means procure or suborn any person to commit, corrupt and willful perjury, on his oath or affirmation, in any action, plea, suit, bill, answer, complaint, indictment, controversy, matter or cause depending or which may depend in any of the courts of this state, or before any referee or arbitrator, or in any deposition or examination taken or to be taken pursuant to the laws of this state before any public officer legally authorized to take the same, shall be guilty of a high misdemeanor.

2:157-4

Any person, his procurors, aiders and abettors, who shall willfully swear falsely in any judicial proceeding, or who shall willfully swear falsely before any person authorized by virtue of any provision of law of this state to administer an oath and acting within his authority, shall be guilty of false swearing.

2:157-5

Where a person has made contrary statements on his oath or oaths administered within the provisions of this article, it shall not be necessary to allege in an indictment or allegation which statement is false but it shall be sufficient to set forth the contradictory statements and allege in the alternative that one or the other is false.

Proof that both such statements were made under oath duly administered shall be prima facie evidence that one or the other is false; and if the jury are satisfied from all the evidence beyond a reasonable doubt that one or the other is false and that such false statement was willful, whether the same was made in any judicial proceeding or before a person authorized to administer an oath and acting within his authority, it shall be sufficient for a conviction.

2:157-6

The rule that there must be corroboration or proof by more than one witness to establish the falsity of testimony of statements under oath shall not be applicable to prosecution under this article. It shall not be necessary to prove, to sustain a charge under this article, that the oath or matter sworn to was material, or if before a judicial tribunal, that such tribunal had jurisdiction.

2:157-7

False swearing is hereby constituted a misdemeanor.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 271

In the Matter of the Criminal Contempt Charge

—against—

ROBERT CARUBA.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner respectfully shows:

The only purpose in filing this reply brief is to correct some of the misstatements and misapprehensions in the brief in opposition to the petition for a writ of certiorari filed by the respondent.[1] In order to save the Court's time, we deal with those errors *seriatim*.

1. As pointed out in the petition (p. 8, n. 3) the alleged misconduct of Caruba here at issue relates neither to the alleged destruction of evidence nor to the disobedience of

[1] We also wish to advise the Court that since the writing of the petition for writ of certiorari, the Vice-Chancellor has issued a decree dismissing complainant's bill in the main case because of "unclean hands."

court orders.[2] Only the contradictory statements provided the basis for the contempt judgment.

2. Respondent suggests that it was necessary for petitioner to appeal simultaneously to the Court of Errors and Appeals and to the Chancellor from the contempt order issued by the Vice-Chancellor. It is a novel and shocking proposition that any person should have to appeal to two separate courts at the same time from a single judgment. No New Jersey statute or judicial precedent would justify or even indicate such a procedure. Petitioner did all he could under the New Jersey procedure as indicated in the marginal excerpt from the petition of appeal to the Chancellor.[3] Indeed, until now there has been no suggestion in this case that the appeal to the Chancellor, following upon the decision by the Court of Errors and Appeals, was untimely, and the Chancellor did not so hold.

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[2] Particularly prejudicial is respondent's reference to another contempt proceeding. That proceeding was for civil contempt. On advice of counsel petitioner refused to yield certain records which it was believed would reveal a secret process. The refusal was made pending an application to the Vice-Chancellor for a ruling. Petitioner was nevertheless held in civil contempt. On appeal by the corporate defendant from the order of discovery under which these records were demanded, complainant withdrew its demand, and the civil contempt became moot.

[3] "Following the entry of the said order under review, petitioner prosecuted an appeal to the New Jersey Court of Errors and Appeals. Prior to instituting the said appeal petitioner, by his counsel, advised the Chancellor of the proceedings and of the doubt as to whether jurisdiction to review existed in the Chancellor or in the New Jersey Court of Errors and Appeals. The said doubt arose out of the question whether the alleged contempt was committed in the presence of the Court of Chancery or elsewhere than in the presence of the Court of Chancery. If the alleged contempt was committed in the presence of the Court of Chancery then the New Jersey Court of Errors and Appeals was without jurisdiction to review the judgment on its merits and the sole power to review was vested in the Chancellor. Petitioner believing that the alleged contempt was committed elsewhere than in the presence of the Court of Chancery, stated to the Chancellor that he would prosecute said appeal to the New Jersey Court of Errors and Appeals, but that if the New Jersey Court of Errors and Appeals should hold that the contempt was committed in the presence of the Court of Chancery your petitioner would thereupon pray for a review by the Chancellor pursuant to the authority hereinabove mentioned." (R. 2205-2206)

3. Obviously, since petitioner is still in jeopardy of a jail sentence, the case has not become moot. Moreover, the amendment of N. J. R. S. 2:15-13 since the filing of the petition for a writ of certiorari merely conforms the procedure to the constitutional reform. Though new courts with new titles have replaced the old, jurisdiction over the issues raised in this case has not been destroyed.

4. Respondent does not claim that the decision of the New Jersey Court of Errors and Appeals was not completely unanticipated. Indeed, he could not so claim in the face of the New Jersey statutes. He merely claims that a court passed upon all of petitioner's claims. But, of course, it is as much a deprivation of due process when a court of limited jurisdiction without prior notice exceeds the limits of its jurisdiction, usurps the power of another court, and passes upon claims which it has no authority to consider, as it is for a court to deny all review. Due process and equal protection of the law require not appellate caprice but orderly procedure.

5. Respondent asserts that in New Jersey obstruction is not a necessary element of contempt. We believe that the decision of the Court of Errors and Appeals in the present case establishes that obstruction is a vital element. If it is, the absence of any charge or finding of obstruction in the trial court gives rise to one of the federal questions. But if respondent is correct in his interpretation of New Jersey law, we contend (pp. 18-19) that the federal Constitution makes obstruction a necessary element.

6. The relationship of the Chancellor and the Court of Errors and Appeals, so far as is revealed by the New Jersey statutes relating to review of contempt proceedings, was not that of subordinate and superior but rather of mutually exclusive jurisdictions depending on whether or not the contempt was *in facie curiae*. If, as is contended by respondent, in contempt proceedings the Chancellor is always subject to

review by the highest court of New Jersey, that court has jurisdiction to hear the appeal now pending before it. That question, however, cannot be resolved until the Supreme Court of New Jersey acts on the appeal. Nor can the question whether the remittitur of the Court of Errors and Appeals was intended to adjudicate the merits be resolved until its successor, the Supreme Court of New Jersey, interprets that remittitur.[4]

CONCLUSION.

For the reasons set forth in the petition for a writ of certiorari, it is respectfully submitted that this case is one calling for the exercise by this Court of its jurisdiction by writ of certiorari.

Respectfully submitted,

THOMAS J. BROGAN,
JACOB L. NEWMAN,
JOSEPH WEINTRAUB,
PHILIP B. KURLAND.

[4] The remittitur, as pointed out in the petition (p. 11, n. 8), both affirmed the conviction and dismissed the appeal. There was no question of the power of the Court of Errors and Appeals to review the jurisdiction of the Vice-Chancellor as a matter of common law. So much of the remittitur as affirmed may, therefore, relate only to this power and the dismissal may relate to the merits.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 271

In the Matter of the Criminal Contempt Charge

against

ROBERT CARUBA.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counter-Statement Concerning Jurisdiction

The respondent respectfully submits that the petitioner in his pending application is not seeking a review from the final judgment in this cause which was rendered by the court of last resort of the State of New Jersey. That final judgment was filed on January 9, 1948 (R. 2184), more than eight months prior to the filing of the petition herein. That judgment consisted of a remittitur of the Court of Errors and Appeals which, in fact, fully adjudicated all the rights of the petitioner. The nature and extent of the petitioner's arguments and the review obtained by him before that court of final authority in the State of New Jersey are more fully discussed hereinafter. The order of the Chancellor of New Jersey from which certiorari is here sought, was merely a recognition of the finality of the judgment of the Court of Errors and Appeals. That application to the Chancellor of New Jersey was a futile effort to review the judgment

of the court of last resort of that state. The Chancellor dismissed the application because to do otherwise "could be construed as and was a challenge to the judgment of the court of last resort of this State, which resolved and decided all the material questions raised in the present petition" (R. 2212, fol. 2228).

Opinions Below

Since the printing of the petition herein, the opinion of the Chancellor of New Jersey (R. 2211) denying a review of the judgment of the New Jersey Court of Errors and Appeals has been officially reported in 142 N. J. Eq. 358.

Counter-Statement of the Case

It is not our purpose here to portray at length the severity of Caruba's offenses. The attenuated version of his crimes as related in the petition filed by him before this court does not in the slightest degree depict the scope and depth of his grave conduct. It required more than forty printed pages to portray even sketchily to the court below how ramified and sweeping were the corruptive practices of the petitioner during the trial of the original cause. Untold quantities of evidence were wilfully and admittedly mutilated and destroyed by him. His testimony consisted of a web of evasions and a tissue of lies. His every effort was lent to baffle the judicial inquiry and to frustrate the search for truth. Each answer was given by him for the sole purpose of fobbing off the examination. Orders for the production of records were defied by him, and his corrupt and perjurious practices reached their acme at a time when he was already under virtual probation on a previous contempt conviction in the same cause. The record is voluminous (more than two thousand pages), but it is only upon a careful reading of all the testimony that the gravity

of Caruba's offenses can completely be appraised. This court may rest well assured that it was for good reason that the trial court described Caruba's conduct as the worst that ever came to his official notice in his more than a quarter of a century in the judiciary of New Jersey (R. 44), and that the New Jersey Court of Errors and Appeals characterized his crimes as brazen and without penitence (R. 2183).

Caruba's perjuries occurred when the cause was being heard before AUGUSTUS C. STUDER, one of the Masters of the Court of Chancery of New Jersey. The reference to Mr. Studer was made in pursuance of the rules of that court. Under the law of New Jersey, a Master, when he sits for the Chancellor (as was the case at bar) is, *pro hac vice*, the Chancellor. It was so held by the Vice Chancellor (R. 56), and this holding was affirmed by the New Jersey Court of Errors and Appeals (R. 2183).

The matter of Caruba's perjuries and contempts was laid before the Chancellor of the State of New Jersey by means of a lengthy petition setting forth in minute detail the nature of Caruba's offenses and the charges of criminal contempt arising therefrom (R. 1-37). The said petition alleged that the perjurious testimony of Caruba was given "corruptly and for the purpose of obstructing and subverting the justice of the cause" and prayed that he be cited to appear before the Chancellor to answer the charges (R. 32). That petition was verified by a supporting affidavit. On September 14, 1946, the Chancellor ordered Caruba to show cause on the 19th day of September why he should not be adjudged guilty in contempt of the Court of Chancery (R. 38-39). Application was thereupon made by Caruba's counsel to adjourn the hearing until October 9, 1946, and that request was granted by the court (R. 41).

On October 9, 1946, the trial of the contempt was had before the Honorable MAJA LEON BERRY, one of the Vice

Chancellors of the court. The matter was heard by him for the Chancellor of New Jersey under a general reference, provided for by the rules of court. Although Caruba pleaded not guilty, *the testimony and its falsity were both admitted by his counsel at the hearing* (R. 89-123). No federal question was raised or argued at any time during the course of the proceedings. At the conclusion of the trial an opportunity was afforded to counsel by the court to argue the law of the matter by way of written memoranda. Lengthy briefs were submitted by both sides, but nowhere and at no time was any federal question raised; nor was it argued or asserted that there was any denial of due process of law or equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution.

On January 29, 1947, the Court of Chancery filed a lengthy opinion in which all the points raised by counsel were considered and disposed of with painstaking care (R. 42-74). In view of the fact that no federal question was raised by Caruba's counsel, the matter was neither discussed nor considered by the trial court. The court held that under the law of the State of New Jersey the Master, at the time the perjuries were committed, was *pro hac vice* the Chancellor of the State of New Jersey and that Caruba's contempt was therefore *in facie curiae*. On February 20, 1947, an order was entered adjudging Caruba guilty of criminal contempt and he was sentenced to sixty days in the county jail (R. 75).

Under the statutes and practice of New Jersey, three courses of appeal were available to the petitioner:

(1) He could have taken an *immediate* appeal from the judgment of conviction to the Chancellor.[1]

1. New Jersey Revised Statutes 2:15-12 appears in full on page 21 of the Petition. The statute provides that any person adjudicated guilty of contempt in the presence of a Vice Chancellor shall have the right of *immediate* appeal to the Chancellor, which appeal shall operate as a stay of proceedings. (Italics ours.)

(2) He could have taken an appeal to the Court of Errors and Appeals of New Jersey,[2] which was then the court of last resort of that state.[3]

(3) He could have done what he is attempting to do in the instant proceedings, viz. take his appeal to the Chancellor and at the same time apply for review before the New Jersey Court of Errors and Appeals on the condition that if the Chancellor takes jurisdiction, the appeal to the Court of Errors and Appeals be dismissed (See p. 2 of the Petition).

Notwithstanding the fact that the Vice Chancellor found that Caruba's contempt was *in facie curiae,* Caruba chose to side-step his right of appeal to the Chancellor and to seek review in the court of last resort. On March 17, 1947, Caruba filed his Notice of Appeal to that court (R. 80), and shortly thereafter filed his Petition of Appeal setting forth various grounds upon which he based all his allegations of error. More than thirty grounds of appeal are set forth in that petition (R. 82-88). Nowhere among those grounds is a federal question raised. Nowhere is there mentioned the charge that Caruba was denied due process of law or equal protection of the laws. A brief was thereafter filed by the appellant consisting of 160 printed pages of argument on fact and law. Every meritorious and procedural question was argued at great length but at no time was any federal constitutional question presented or argued. A copy of the index to that brief prepared by Caruba's counsel is set forth in the appendix hereto (pp. 21 and 22). Subsequently a further brief was filed by him in that court consisting of 22 additional pages. Neither in that second brief nor when the matter was argued orally

2. New Jersey Revised Statute 2:15-13 appears in full on page 9 of the Petition. It provides that when any person is adjudicated guilty of contempt of court by the Court of Chancery for acts done or omitted elsewhere than in the presence of the court, he may appeal from such adjudication to the Court of Errors and Appeals.

3. Article VI Section I Paragraph 1 of the New Jersey Constitution of 1844 reads as follows: "The judicial power shall be vested in a court of errors and appeals in the last resort in all causes as heretofore; * * *"

before that highest court of the State of New Jersey was the question of denial of due process or equal protection mentioned.

On October 31, 1947, the New Jersey Court of Errors and Appeals filed its opinion affirming the conviction (R. 2182). It will be observed that substantially every question raised by Caruba in his petition of appeal and in his briefs before that court were passed upon and disposed of. Thus Caruba was afforded a full hearing by the court of last resort of the State of New Jersey on all the factual, meritorious and procedural questions raised by him both in the court of first instance and in the court of last resort.

On November 7, 1947, and before the remittitur of the Court of Errors and Appeals was filed, the petitioner applied to the Court of Errors and Appeals for leave to reargue the appeal (R. 2185). In his petition for such leave, a federal question was first raised. In that petition he repeated the arguments theretofore made with respect to "obstruction" but for the first time charged the proceedings with a constitutional taint. The petition for rehearing was denied by the Court of Errors and Appeals without opinion on December 11, 1947 (R. 2204), and on January 9, 1948, a remittitur was entered in that Court affirming the conviction (R. 2184). On January 12, 1948, a second application for reargument was made to the Court of Errors and Appeals. That second petition for rehearing was in all respects identical with the first petition for rehearing (R. 2197). However, in the brief supporting the second application for rehearing, petitioner urged an alternate suggestion upon the court (R. 2194). That suggestion was that if leave to rehear be denied, then the court should *dismiss* his appeal without prejudice notwithstanding that it considered all the meritorious issues raised in his original petition of appeal and briefs. The petitioner argued that if the Court of Errors and Appeals would modify the remittitur so as to dismiss the appeal without prejudice

rather than to affirm the conviction, he could then inaugurate new proceedings to the Chancellor for another appeal (R. 2196). Petitioner's application was again denied without opinion and the remittitur of the Court of Errors and Appeals affirming the conviction, which had theretofore been entered on January 9, 1948, remained undisturbed. The filing of this remittitur constituted the final judgment in this cause.

Notwithstanding the fact that the Court of Errors and Appeals refused to dismiss the appeal in the face of petitioner's argument that such dismissal was necessary to put him "in the position to seek a review before the Chancellor" (R. 2196), the petitioner instead of applying to this court at that time for a writ of certiorari within the statutory time limit, appealed from his judgment of conviction to the Chancellor of the State of New Jersey, a court subordinate in jurisdiction to the Court of Errors and Appeals (R. 2205). In his petition of appeal to the Chancellor (R. 2205-2210) Caruba alleged numerous grounds of error committed by the Vice Chancellor. We respectfully request this court to make a side-by-side comparison between this petition of appeal to the Chancellor and the petition of appeal originally presented to the Court of Errors and Appeals, discussed earlier in this brief and appearing in the record at page 82 *et seq.* Every allegation of error in the petition before the Chancellor with the exception of allegations 9, 17, 18 and 19, had previously been urged in the petition before the Court of Errors and Appeals. Those four allegations of error, except with respect to the federal aspect, had previously been argued *in extenso* in Caruba's briefs before the Court of Errors and Appeals and were fully considered and determined by that court even though they did not appear as such in the petition of appeal before that court. The federal questions were first raised on a petition for rehearing before the Court of Errors and Appeals after that court had rendered its decision. In other words, every ground of error

urged by Caruba before the Chancellor had theretofore been considered, passed upon and disposed of before the Court of Errors and Appeals.

The Chancellor of the State of New Jersey heard Caruba's appeal. The matter was argued before him personally and briefs were submitted. On June 9, 1948, the Chancellor filed his opinion (R. 2211). In that opinion he stated that the judgment of the Court of Errors and Appeals "which resolved and decided all the material questions raised in the present appeal," was final and dispositive and "must be respected and obeyed" by him (R. 2212-2213). On July 6, 1948, the petition of appeal before him was dismissed. It is from this dismissal that *certiorari* is now sought.

Counter-Argument

It is respectfully urged that the petition for a writ of certiorari be denied for the following reasons:

1. The constitutional revision of the court system of of the State of New Jersey which abolished the Court of Chancery and the office of Chancellor of New Jersey has rendered moot the application before this court.
2. The time for appeal to this court has expired.
3. The Federal question was not timely raised in the court below.
4. The defendant was not denied due process of law or equal protection of the laws.

The Question Has Become Moot

When the government of the colony of New Jersey was established by the Constitution of 1776, the Governor of the state was also designated as the Chancellor of the

colony.[4] By the Constitution of New Jersey adopted in 1844, a Court of Chancery was created,[5] to consist of a Chancellor.[6] On January 1, 1948, a new constitution became effective. The office of Chancellor and the Court of Chancery were eliminated.[7] All the functions, powers and duties which had theretofore been conferred upon the Chancellor were transferred, under the new constitution, to the judges of the Superior Court.[8] Under the new constitution, appeals from the Superior Court may be taken to the Appellate Division of the Superior Court,[9] and from there, by grace, to the New Jersey Supreme Court.[10] The new Supreme Court has become the court of last resort in all causes[11] in lieu of the former Court of Errors and Appeals which was abolished. Although the new constitution became effective on January 1, 1948, the judicial article thereof took effect on September 15, 1948, two days after the petition for a writ of certiorari was filed in this Court.

The petitioner complains that when the New Jersey Court of Errors and Appeals affirmed his conviction, after considering all the merits and procedural questions raised and argued, he was denied the right thereafter to appeal to the then Chancellor, a court whose jurisdiction was inferior to the Court of Errors and Appeals. He contends that notwithstanding the fact that the court of final authority had passed upon the validity of the judgment and had denied his application for a further appeal to the Chancellor, nevertheless the Chancellor, by dismissing the petitioner's appeal subsequently made to him, had denied him his constitutional rights. He asserts that the statute providing for an immediate appeal to the Chancellor from the conviction by the Vice Chancellor is still available to him

4. New Jersey Constitution of 1776, Section VIII.
5. New Jersey Constitution of 1844, Article VI, Section 1, Paragraph 1.
6. New Jersey Constitution of 1844, Article VI, Section 4, Paragraph 1.
7. New Jersey Constitution of 1947, Article VI, Section 1, Paragraph 1.
8. New Jersey Constitution of 1947, Article XI, Section 4, Paragraph 10.
9. New Jersey Constitution of 1947, Article VI, Section 5, Paragraph 2.
10. New Jersey Constitution of 1947, Article VI, Section 5, Paragraph 1.
11. New Jersey Constitution of 1947, Article VI, Section 2, Paragraph 2.

notwithstanding the fact that the Court of Errors and Appeals had already adjudicated all questions. The very statute upon which the petitioner relies[12] has since been repealed.[13]

If a writ should be allowed, then in effect this court would be requested to send the matter back to the Chancery Division of the Superior Court of New Jersey which has already passed upon the issues, or in the alternative, to the Appellate Division of the Superior Court[14] which is in itself a court inferior to the new Supreme Court, the successor to the Court of Errors and Appeals which also has passed upon the subject. The Appellate Division would then be bound by the law of the case which had already been laid down by the former Court of Errors and Appeals. In other words, this court is being requested to remand the case for trial before a tribunal which has already passed upon and decided the case and the issues therein involved. We submit that the facts of the case fall directly within the holding of *United States* v. *Evans*, 213 U. S. 297, where this court held that when the judgment appealed from cannot be affected by the decision of this court the case becomes a moot one and the appeal should be dismissed. It should also be noted that no question of future public interest is involved in this application because the very court complained of and the very procedure sought to be availed of have both since been abolished.

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12. N. J. R. S. 2:15-12.

13. Laws of New Jersey 1948 Chapter 333, Section 3, approved August 30, 1948, effective September 15, 1948.

14. New Jersey Laws of 1948, Chapter 333, Section 1, effective September 15, 1948, reads as follows:

"1. Section 2:15-3 of the Revised Statutes is amended to read as follows:

2:15-3. Every summary conviction and judgment by the Law Division or Chancery Division of the Superior Court, a county court or any inferior court for a contempt shall be reviewable, both upon the law and the facts, by the Appellate Division of the Superior Court, which court shall give such judgment as it shall deem to be lawful and just under all the circumstances of the case and such judgment shall be enforced as the court shall order."

The Time for Appeal Has Expired

The second reason urged by us for a dismissal of this petition is that the time for appeal to this court has expired. The final judgment of the court of last resort of New Jersey was filed on January 9, 1948 (R. 2184). That judgment was entered after every factual, meritorious and procedural question had been raised, argued, twice reargued, considered and disposed of. The taking of a futile appeal to a state court of inferior jurisdiction after a court of final authority refused to mould its judgment so as to enable the petitioner to take such an appeal, could not in any way alter the finality of the adjudication by the highest court of the state. When that abortive appeal to the Chancellor was made, the Chancellor himself held that "the judgment which the defendant seeks to modify is not now the decree of this court (the Court of Chancery), except for a single purpose, namely to be carried into effect; for all other purposes it is the judgment of the court of last resort, and as such must be respected and obeyed by this court. *Jewett* v. *Dringer*, 31 N. J. Eq. 586, 590" (R. 2213).

It is contended by the petitioner that the appeal to the Chancellor was a necessary step to exhaust his remedies in the state courts. This contention is untenable. The Court of Errors and Appeals had already denied the petitioner the right of appeal to the Chancellor by refusing to enter the petitioner's form of remittitur which would have opened the door for an application to the Chancellor for review.[15] At this point all remedies in the State of New Jersey had been exhausted. Notwithstanding the fact that the Court

15. The form of remittitur proposed by the petitioner appears on pages 2192-2193 of the record. The form requested recites that the appeal "be and the same is hereby dismissed for want of jurisdiction in this cause, without prejudice to the right, if any, of the appellant to prosecute a review elsewhere."

The application for that form of remittitur was denied by the Court of Errors and Appeals on February 9, 1948 (R. 2204).

of Errors and Appeals had denied that the petitioner had any right further to prosecute his appeal to the Chancellor, he proceeded to press an appeal before the Chancellor reasserting all grounds theretofore argued before and passed upon by the court of last resort. The act of the Chancellor in dismissing the appeal before him was in direct pursuance of the mandate implicit in the Court of Errors and Appeals decision. It neither did nor could add to the finality of that decision.

The remittitur of the Court of Errors and Appeals having been filed on January 9, 1948, the time for filing the within application expired April 9, 1948. 28 U. S. C. A. Sect. 350. So peremptory is this statutory mandate, that even where good cause was shown and an extension was granted by a member of this court after the three months' period had expired, this court held that it was without jurisdiction to entertain the appeal. *Matton Steamboat Co.* v. *Murphy,* 319 U. S. 412. Nor did petitioner's recourse to the Chancellor serve to toll the running of the three months' period, for the judgment of the New Jersey appellate tribunal fully determined the rights of the parties, so that nothing remained to be done by the lower court except the ministerial act of entering the judgment which the appellate court had directed. *Jewett* v. *Dringer,* 31 N. J. Eq. 586, 590. The Chancellor so held in his opinion in the instant case (R. 2211, at p. 2213). The foregoing test of finality was recently asserted in *Department of Banking* v. *Pink,* 317 U. S. 264, where this court said, at page 268:

> "For the purpose of the finality which is prerequisite to a review in this court, the test is not whether under local rules of practice the judgment is denominated final (Wick v. Superior Court, 278 U. S. 575, 49 S. Ct. 94, 73 L. Ed. 515; Cheltenham & Abbington Sewerage Company v. Pennsylvania Public Utility Commission, 317 U. S. 588, 63 S. Ct. 38, 87 L. Ed. ——, decided October 12, 1942), but rather whether the record shows that the order of the appel-

late court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court. See Gorman v. Washington University, 316 U. S. 98, 62 S. Ct. 962, 86 L. Ed. 1300. Where the order or judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of the judgment for purposes of review is established."

The Federal Questions Were Not Seasonably Raised

The third reason asserted by us for a dismissal of the application is that the federal questions advanced herein by the petitioner were not seasonably raised in the state courts. The first time that *any* federal question was asserted by the petitioner was upon petition for rehearing after the cause had been fully submitted to and decided by the Court of Errors and Appeals (R. 2188). In the petition of appeal presented by Caruba before that court (R. 82), and in the exhaustive briefs submitted by him in the course of that appeal, never once was a federal claim made. It was held by this court in *American Surety Co.* v. *Baldwin*, 287 U. S. 156, that it is too late to assert a federal claim in a petition for a rehearing before the state court of last resort. Of similar holding are *Radio Station WOW* v. *Johnson*, 326 U. S. 120; *Missouri ex rel. Missouri Insurance Co.* v. *Gehner*, 281 U. S. 313; *Rooker* v. *Fidelity Trust Co.*, 261 U. S. 114; *Wall* v. *Chesapeake & Ohio R. R. Co.*, 256 U. S. 125. Petitioner seeks to avoid the force of these decisions by claiming "surprise" and asserting that the federal questions arose for the first time when the appellate court rendered its opinion. We respectfully submit that such assertion is legally incorrect with respect to all three federal questions raised in the petition and *factually* incorrect with respect to the third. The question of obstruction was argued at great length before the trial

court (R. 96-123) and before the appellate tribunal. We refer this court to Paragraphs 2e, 3d, 3e, 4b, 4c, 4f, and 11 of the Petition of Appeal to the New Jersey Court of Errors and Appeals (R. 83-86) and to Point II of appellant's main brief before that court (see Index page of appellant's brief set forth in Appendix hereto). This question of obstruction had been raised throughout the proceedings, but solely as a matter of state law. There had been ample opportunity to present the objection as one arising under the Fourteenth Amendment, but it was never availed of. The federal claim must be made *as such* directly and at the earliest opportunity and with sufficient definiteness so that there can be no doubt that the attention of the state court was challenged thereto. *Live Oak Water Users' Assn.* v. *Railroad Commission,* 269 U. S. 354. The fact that it was raised solely as a matter of state law cannot serve as a basis for review by this court. *American Surety Co.* v. *Baldwin, supra.*

Petitioner contends that he was lured into a "trap" when the appellate court, after deciding that his contempt was *in facie curiae,* did not remand the case to the Chancellor for further action, but proceeded to consider and decide all the meritorious and procedural issues raised and argued by him *in extenso* in his appeal. This, he urges, was an unanticipated disposition of the case and falls within the exception as laid down in *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill,* 281 U. S. 673. But an examination of the *Brinkerhoff* case reveals that because of the "unanticipated act" of the Missouri Supreme Court, the appellant was completely denied any review whatsoever; whereas in the case at bar, Caruba sought and obtained a complete review of the law and the facts of his case by the court of final authority of New Jersey.

There Was No Denial of Due Process or Equal Protection

We respectfully urge, as a final reason for the dismissal of the petition, that the petitioner has presented no meritorious grounds for appeal to this court, and that he has not been denied due process of law or equal protection of the laws. His petition presents three federal questions and we shall dispose of them *seriatim.*

The first question raised by him is that the appellate court found an obstruction to the administration of justice whereas there was no prior charge or determination of obstruction in the trial court. In New Jersey, obstruction is not a necessary element of contempt. The test is that the contemptuous act must either tend or be designed to thwart the judicial process.[16] The petition which inaugurated the proceedings recited the offenses at length and then charged that the "testimony was given corruptly and for the purpose of obstructing and subverting the justice of the cause" (R. 32). The Vice Chancellor in his opinion did not find there was *no* obstruction.[17] He merely stated

16. *In re Hand*, 89 N. J. Eq. 469; *State* v. *Doty*, 32 N. J. L. 403; *In re Merrill*, 88 N. J. Eq. 261; *Sachs* v. *High Clothing Co.*, 90 N. J. Eq. 545; *In re Megill*, 114 N. J. Eq. 604; *In re Hendricks*, 113 N. J. Eq. 93; *Backer* v. *A. B. & B.*, 107 N. J. Eq. 246; *In re Ries*, 101 N. J. Eq. 315; *Ivens* v. *Empire Floor*, 119 N. J. Eq. 273; *Edwards* v. *Edwards*, 87 N. J. Eq. 546; and *Seastrom* v. *N. J. Exhibition Co.*, 69 N. J. Eq. 15.

17. The Vice-Chancellor, in appraising Caruba's conduct, stated in his opinion (R. 50):

> "And there was nothing in the conduct of this defendant as a witness which calls for any reward. His recantation or retraction was not the result of contrition or repentance. It was not voluntary. It came only after a long period of relentless questioning by counsel and after the defendant witness had been driven into a corner, or *cul de sac*, from which there was no escape except by a confession of his iniquity. In one instance the false testimony was given on April 2, 1946. It was not corrected until April 5, three days later, when his confession was literally torn from him. In the other case he testified on May 2nd and recanted the same day under like circumstances. And still there is no sign of repentance. He admits having tried to deceive the court, but claims that because of his confession he has done no wrong. The perjury was the result of a studied plan of defense, thought out long in advance of the trial in which committed. This is apparent from the admitted mutilation of the $250.00 check months before the trial. And yet he offers no apology. He is still arrogant. A confession of sin without repentance merits no reward of forgiveness, nor is it a key to salvation."

that under the law of New Jersey, "any act or conduct which obstructs or tends to obstruct the course of justice constitutes a contempt of court" (R. 51). This question of obstruction was argued with painstaking detail before the Court of Errors and Appeals, and that court found that the contempt was intended to and did impede the course of justice and therefore was obstructive (R. 2183). It is contended by the petitioner that this constitutes a denial of due process. It is not denied by the petitioner that he had the unlimited opportunity to present all his defenses, and that he availed himself of that opportunity fully in the trial court and upon appeal. Due process is satisfied if there is reasonable notice and reasonable opportunity to defend. *Dohany* v. *Rogers*, 281 U. S. 362; *Hurwitz* v. *North*, 271 U. S. 40; *Backus* v. *Union Depot Co.*, 169 U. S. 569. Cases applying this rule specifically to contempt charges are *Cooke* v. *United States*, 267 U. S. 517; *Randall* v. *Brigham*, 7 Wall. 523; and *In re Savin*, 131 U. S. 267. The law in New Jersey is the same. *In re Cheeseman*, 49 N. J. L. 115. That there was any doubt or misapprehension as to the charges is inconceivable. There is no suggestion in the record that the time and opportunity given to Caruba for defense was not ample. He was represented by able counsel throughout the proceedings and was heard fully in the court below and in the court of last resort.

The second federal question asserted by petitioner is that the Chancellor, in dismissing his appeal after the matter had been reviewed by the Court of Errors and Appeals, deprived the petitioner of a hearing on the merits, and that by this action, the petitioner was denied equal protection of the laws. He states that the appellate court dealt with "*some* of the merits of petitioner's case" and creates the misleading impression that there were *other* merits which the Chancellor might have passed upon had not the appellate tribunal foreclosed that opportunity. The fact of the matter is that the petitioner in his appeal to the appellate court sought a decision by that court on all the merits of

his defense. Having obtained an adverse ruling on all issues, he proceeded with a new appeal before the Chancellor asserting *precisely* the same merits that he had theretofore laid before the appellate court. No meritorious defense was asserted before the Chancellor which had not theretofore been presented to the higher court and passed upon by it.[18]

It is to be noted that an appeal was taken to the New Jersey Court of Errors and Appeals from the Chancellor's order of dismissal, which appeal at present is pending and undecided. This action magnifies the anomaly of the petitioner's position, for he recognizes the fact that any disposition of the cause by the Chancellor is subject to review by the very court which had already considered and adjudicated the matters in issue. He was never denied an appeal. He sought and obtained a review before the highest tribunal of the state. His attempt to return to the Chancellor is analogous to attempting to return to the Circuit Court of Appeals for a review of a District Court judgment which the United States Supreme Court had fully reviewed on direct appeal. The statutory right of *immediate* appeal to the Chancellor was available to the petitioner. He chose to by-pass that forum by going directly to Errors and Appeals. The final judgment of the state court must be taken as determining that the procedure actually adopted satisfied all state requirements. This court, in reviewing a judgment of the state court, will not decide local questions. *United Gas* v. *Texas*, 303 U. S. 123, 139; *John* v. *Paullin*, 231 U. S. 583, 585; *Lee* v. *Central of Georgia R. Co.*, 252 U. S. 109, 110; *Central Union Co.* v. *Edwardsville*, 269 U. S. 190, 194, 195.

The final federal question argued by the petitioner is that in fact there was no obstruction and therefore his conviction was without due process. We have already pointed

18. The Chancellor, in his opinion (R. 2212), stated that the court of last resort "resolved and decided all the material questions raised" in the petition before him.

out that this federal question could have been raised in the trial court and in the state appellate court. It was not urged until a petition for reargument was made to the appellate court. Caruba concedes in his petition herein that the federal question was not timely raised. However, he contends that this court will permit federal questions to be raised unseasonably if such is the practice in the state court. He then asserts that such is the practice of New Jersey. The contrary is the fact. In New Jersey an appellate tribunal will not consider any point of appeal which was not seasonably raised in the court below, except questions of jurisdiction and public policy.[19] The cases cited in the footnote are only a few of the host of authority in the State of New Jersey holding contrary to the petitioner's contention.

Caruba asserts that there was no finding of actual obstruction in the state courts, and this notwithstanding the fact that the New Jersey Court of Errors and Appeals in its opinion specifically found obstruction to exist (R. 2183). The requirement of obstruction is purely one of local law. As was heretofore stated the law of New Jersey is clearly to the effect that it is sufficient if the contempt be one which is designed or tends to obstruct the administration of justice.[20] That is the local law of New Jersey even though other jurisdictions may hold otherwise. The Due Process Clause has never been perverted so as to force upon the forty-eight States a uniform code of criminal procedure. *Carter* v. *Illinois*, 329 U. S. 173, 175.

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19. *Oliver* v. *Phelps*, 20 N. J. L. 180, affd. 21 N. J. L. 597; *Penn Mut. Life Ins. Co.* v. *Semple*, 38 N. J. Eq. 575; *Van Alstyne* v. *Franklin Council*, 69 N. J. L. 672; *Webster* v. *Board of Chosen Freeholders*, 86 N. J. L. 256; *Allen* v. *City of Paterson*, 99 N. J. L. 489; *Goldfarb* v. *Phillipsburg Transit Co.*, 103 N. J. L. 690; *Trimmer's Executor* v. *Adams*, 18 N. J. Eq. 505; *Noon* v. *D. L. & W. R. Co.*, 106 N. J. L. 526, certiorari denied 283 U. S. 818; *Werner* v. *Commonwealth*, 109 N. J. L. 119; *Singac Trust Co.* v. *Totowa*, 112 N. J. L. 99; *Jasion* v. *Preferred Accident Insurance Co.* 113 N. J. L. 108; *Ruppert* v. *Jernstedt & Co.*, 116 N. J. L. 214; *Wilentz* v. *Society for Establishing Useful Manufacturers*, 121 N. J. L. 197; *Rosenbloom* v. *Great American Indemnity Co.*, 122 N. J. L. 337; *Armour* v. *Carboy*, 124 N. J. L. 205; *Benz* v. *Central Railroad of N. J.*, 82 N. J. L. 197, affd. 83 N. J. L. 780; *Slater Realty Corp.* v. *Meys*, 137 N. J. L. 263.

20. See footnote 16.

Conclusion

Petitioner at the commencement of his application herein informs this court that an appeal has been taken to the New Jersey Court of Errors and Appeals seeking a review in that court of the Chancellor's order of dismissal. The very basis of the Chancellor's order, as stated in his opinion (R. 2211) is that he was without power to review the judgment of the Court of Errors and Appeals which had fully passed upon the subject matter and which had refused to place Caruba in a position where an appeal to the Chancellor would lie. The present appeal to the Court of Errors and Appeals is one more step to perpetuate litigation which has become well nigh endless. Upon dismissal of this latest appeal there is nothing to stop Caruba from taking another appeal to the Appellate Division of the new New Jersey Superior Court. Upon dismissal of that appeal, an application could be made to the new New Jersey Supreme Court. The question might then again be brought up to this court for review. We respectfully submit that somewhere there must be an end to litigation. That stage should have occurred when the Court of Errors and Appeals affirmed the judgment of the court below and twice denied reargument. We respectfully urge that this latest maneuver before the highest court of New Jersey is an idle and futile ceremony and that the dismissal of this writ should not await another disposition of a nugatory appeal to a court which has already disposed of the entire subject matter of the controversy, and which only recently denied an application for stay of execution pending the within application.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

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[APPENDIX FOLLOWS]

Appendix

INDEX TO CARUBA'S BRIEF FILED WITH THE NEW JERSEY COURT OF ERRORS AND APPEALS